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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 587

SUNSHINE BOOK COMPANY AND SOLAR UNION NATURISME, INC., PETITIONERS

v.

ARTHUR E. SUMMERFIELD, INDIVIDUALLY AND AS POSTMASTER GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (Pet. App. 73–94) is reported at 128 F. Supp. 564. The opinions of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 41–72) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 3, 1957 (Pet. App. 41). The petition for a writ of certiorari was filed on October 30, 1957. On October 18, 1957, the Court of Appeals granted

a stay of its mandate pending the filing of a petition for a writ of certiorari in this Court. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Postmaster General has statutory power to exclude obscene matter from the mails.

2. Whether the determination by the Post Office Department that petitioners' publications were obscene and therefore nonmailable, which was reviewed and affirmed by the District Court and by the Court of Appeals for the District of Columbia sitting *en banc,* accorded with the standard for obscenity reiterated in *Roth* v. *United States,* 354 U. S. 476.

3. Whether the hearing held by the Post Office Department was a fair hearing which accorded petitioners due process of law.

STATUTE AND REGULATION INVOLVED

1. 18 U. S. C. 1461 provided, in pertinent part: [1]

> "Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character;
>
> * * * * *

[1] The statute as set forth above was in force on January 28, 1955, when the Post Office Department entered its final order declaring petitioners' publications to be nonmailable. On June 28, 1955, it was amended to substitute "indecent, filthy or vile article, matter, thing, device or substance" for "or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character." 69 Stat. 183.

> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

2. The regulation involved is 39 C. F. R. (1949 ed.) 36.2,[2] which is in the words of 18 U. S. C. 1461, *supra*.

STATEMENT

This is an action by two closely-affiliated nudist organizations to compel the Postmaster General to accept for mailing, as third class matter, the February 1955 number of "Sunshine and Health" magazine and the January-February 1955 number of "Solaire Universelle Nudisme" magazine, known as "Sun" magazine. These issues were excluded from the mails after an administrative hearing and appeal in which the Post Office Department found that certain pictures in the magazines were obscene, and that, accordingly, the magazines were nonmailable.

Sunshine Book Company and Solar Union Naturisme Inc. are nonprofit New Jersey corporations which publish these two magazines advocating nudism (J. A. 21-23)[2a] Sunshine Book's magazine

[2] This section, as amended, appears in the 1955 revision as 39 C. F. R. 14.3.

[2a] "J. A." is used to refer to the printed joint appendix, used in the court below and filed in this Court as part of the record, and to the pages, consecutively numbered, added to the joint appendix as part of the record in this Court.

"Sunshine and Health" is published monthly; Solar Union's periodical, "Solaire Universelle Nudisme", is bi-monthly (J. A. 21–23). Ilsley Boone is an editor and principal officer of both corporations (J. A. 9, 14, 19, 39).

1. *Pre-Hearing Proceedings in the Post Office Department.*—The dispute from which the present suit arose began after the printing of the February 1955 issue of "Sunshine and Health" was completed in December 1954. Between December 24 and December 31 of that year, petitioner Sunshine Book Company submitted 400 copies of "Sunshine and Health" to the Postmaster at May's Landing, New Jersey, for mailing as third class matter (J. A. 2, 4, 5–6). The Postmaster was in doubt as to the mailability of the magazine because some of its pictures appeared to be obscene. He therefore submitted a sample copy to the Solicitor of the Post Office Department for a ruling on mailability (J. A. 74). The Solicitor advised him that the copies of the magazine "which are subject to inspection" should be withheld from dispatch, but cautioned him against detaining any copies which were to be handled under seal as first-class matter. The Postmaster was further instructed to notify the petitioner to show cause within 15 days why the magazine should not be treated as nonmailable matter under 39 C. F. R. (1949 ed.) 36.2, *supra*, p. 3 (J. A. 74).

By a letter dated December 31, 1954, the Postmaster communicated the offer of a prompt hearing to Sunshine Book. But he erroneously stated that the Solicitor had determined the magazine to be non-

mailable and that it was to be withheld from dispatch (J. A. 75).

On January 5, 1955, counsel for the petitioner, accompanied by Mr. Boone, conferred in Washington with attorneys from the Post Office Department and asked that the Postmaster General "recede from the position he had taken" (J. A. 14). The following day, petitioners' counsel was given a formal Notice of Hearing making clear that the Postmaster General had taken no position except one of doubt as to the mailability of "Sunshine and Health". This notice expressly stated that no ruling of mailability or nonmailability had yet been made by the Post Office Department. The hearing was set for January 10, 1955, in the Post Office Department at Washington, and petitioner Sunshine Book was informed that the Hearing Examiner's initial decision was subject to appeal to the Solicitor, who would make the final decision for the department (J. A. 41).[1]

On the same day, January 6, 1955, a similar Notice of Hearing was sent to "Solaire Universelle Nudisme" magazine, setting a hearing on the mailability of the January-February issue of that maga-

[1] Petitioners' "Statement of the Case" implies that officials of the Post Office Department, in the performance of their duty to consider petitioners' arguments, held out a "lure" to it which was abruptly withdrawn when the Notice of Hearing was served (Pet. 11). This and other colored descriptions of the negotiations between the parties, as well as other animadversions in the petition against the Post Office Department, are without the slightest support or justification, and we wish to emphasize that the Post Office Department—and the courts below—gave full and fair consideration to petitioners' views.

zine for January 11, 1955, in Washington (J. A. 32, 42).

2. *Denial of Temporary Restraining Order.*—On the same day that it received the Notice of Hearing, January 6, 1955, Sunshine Book filed a verified complaint in the District Court for the District of Columbia (J. A. 2), and moved for a temporary restraining order (J. A. 3), as well as preliminary and permanent injunctions (J. A. 13), to prevent the postal officials from taking any action to withhold the February 1955 issue of "Sunshine and Health" from dispatch. The motion for a temporary restraining order was denied by the District Court (Kirkland, J.) after an appearance before it on January 7, 1955; the court also refused to direct the Post Office Department to postpone its hearing (J. A. 17–18).

3. *The Administrative Hearing.*—In a supplemental affidavit in support of the motion for a temporary restraining order, Mr. Boone deposed that the February 1955 issue of "Sunshine and Health" would be "dead" before a final administrative determination (J. A. 14). Nevertheless, when Sunshine Book was unsuccessful in obtaining an order from the District Court postponing the administrative hearing, counsel for petitioners requested that both hearings be postponed until January 13, and 14, 1955; upon the further request of petitioner, the hearings were postponed until January 17, 1955 (J. A. 17–18, 70, 71).

On January 17, 1955, the scheduled administrative hearing took place before James C. Haynes, a Hearing Examiner. By agreement of counsel, the hearings for both "Sunshine and Health" and "Solaire Uni-

verselle" were consolidated. At the outset of the hearing, Examiner Haynes stated his understanding that "mailability" proceedings were "governed by no published rules of practice or procedure" of which he was aware. But he made clear that the burden of proof to establish non-mailability rested upon the Post Office Department. He further pointed out that his initial decision was subject to appeal to the Solicitor of the Post Office Department under the terms of the Notice of Hearing (J. A. 78).

Counsel for the Post Office Department offered in evidence a copy of the February 1955 issue of "Sunshine and Health" and a copy of the January-February 1955 issue of "Sun Magazine" (J. A. 80).

In response to arguments from counsel for petitioners, the examiner ruled that he did not have authority to determine whether the Postmaster General had legal power to withhold the magazines from dispatch; the only issue he could consider was the factual question of whether or not the magazines contained obscene matter (J. A. 80–81).

Petitioners then offered in evidence a Joint Appendix containing the record of a prior suit by Sunshine Book against the Postmaster General (J. A. 83). Although the president of Sunshine Book (Ilsley Boone) has conceded that the February 1955 issue of "Sunshine and Health" contained different pictures and text from the magazines involved in the prior litigation (J. A. 10), petitioners urged that the matters contained in that Joint Appendix should be received to show that the current proceedings were barred by *res judicata* and *stare decisis*. The representatives of

the Post Office Department objected to the admission into evidence of the affidavits contained in the Joint Appendix, on the ground that they would have no opportunity to cross examine the affiants (J. A. 83). After argument, the examiner admitted the Joint Appendix on the issues of *res judicata* and *stare decisis* but ruled that he would give no evidentiary weight to the affidavits (J. A. 90).

Petitioners next offered extracts from the record in a previous administrative proceeding. These extracts contained the testimony of three psychiatrists, Drs. Ralph Banay, Frederick Wertham, and J. G. Cushing, on the contents of 1948 numbers of "Sunshine and Health" (J. A. 93–94). Again, the representatives of the Post Office Department objected on the ground that they would have no opportunity to cross examine, and that recorded testimony taken many years before would not bear upon the mailability of the two particular numbers before the examiner (J. A. 94). Upon this ground, the Post Office Department's objection was sustained.

Petitioners did not offer any other evidence bearing on the obscenity of the matters in issue before the examiner. After the offer of recorded testimony from the prior proceedings was rejected, petitioners' counsel stated that he had nothing further (J. A. 96).

4. *Ruling by the Hearing Examiner.*—The initial decision and recommendations of the Hearing Examiner was issued on January 20, 1955 (J. A. 61–69). In an extensive opinion, he described in detail the contents of the pictures contained in the magazines. The

February 1955 issue of "Sunshine and Health" was found to be as follows (J. A. 63–64):

> The front cover displays a full-page photograph in color of an entirely nude, young, attractive and shapely woman. On the inside of the front cover is another large photograph of a woman whose upper body and breasts are nude. On the rear cover there appears a large photograph of naked women and a naked man. The inside pages of the magazine contain some 15 photographs of naked men, women and children, singly and in groups. Details of naked buttocks, female breasts and pubic areas, and male genitalia are clearly revealed in some of them. * * *

The January-February 1955 issue of "Sun Magazine" was described in these terms (J. A. 64):

> On the front cover and on the inside of the front cover are large photographs of two naked women, the former being in natural color. The rear cover displays a photograph of two naked women in a rubber raft floating on the water. Within the pages of the magazine are found some 25 or 26 photographs of naked men, women and children, shown singly and in groups. In some of these female breats [sic] and pubes and male genitalia are clearly revealed. * * *

To the illustrations thus described the Hearing Examiner applied the following legal standard (J. A. 64–65):

> The test evolved and commonly applied by the Courts in determining whether a publication is obscene, lewd, lascivious and indecent is whether the publication, taken as a whole, would have a libidinous effect on the average person. In so determining, the publication must

be considered as a whole, in its effect, not upon any particular class but upon all those whom it is likely to reach (*Parmelee* v. *U. S.*, 113 F. (2d) 729, U. S. C. A., D. C., dec. May 14, 1940). It is the "effect of a publication on the ordinary reader" that counts. The dominant effect of an entire publication determines its character and "obscene" indicates the present critical point in the compromise between candor and shame at whch [sic] the community may have arrived here and now (*Walker* v. *Popenoe*, 149 F. (2d) 511, U. S. C. A., D. C., dec. May 28, 1945; *Parmelee* v. *U. S.*, *supra*; *U. S.* v. *Kennerly*, 209 F. 119).

Under these principles, the Hearing Examiner ruled (J. A. 66):

> The right to practice nudism and to advocate its practices by any lawful means is not in issue here. But in the course of such advocacy the display of unadorned nakedness to the public generally is surely offensive to presently prevailing American standards of decency and modesty. The fact that the photographs in these magazines may illustrate nudist life and activities and are accompanied by relevant textual matter upon the subject does not in any way tend to lessen the erotic impact of the photographs themselves upon the mind of the ordinary person. For these reasons I regard the two issues of "Sunshine & Health" and "Sun Magazine" in evidence as obscene, lewd, lascivious and indecent (cf. *Sunshine Book Co.* v. *McCaffrey*, 112 N. Y. S. (2d) 476, Supreme Court, Special Term, N. Y. County, Part III, dec. April 25, 1952).

Upon this basis, the Examiner recommended that the February 1955 issue of "Sunshine and Health", and the January-February 1955 issue of "Sun Magazine" be declared nonmailable (J. A. 69). This decision was appealed by petitioners to the Solicitor of the Post Office Department who affirmed it in a brief opinion dated January 28, 1955 (J. A. 44–45).

5. *Proceedings in the District Court.*—Three days later, on January 31, 1955, petitioners' motion for a permanent injunction came on for hearing in the District Court (J. A. 97). A certified copy of the administrative proceedings and rulings was admitted into the record (J. A. 98). Petitioners challenged the Post Office Department ruling on four grounds: (1) that 18 U. S. C. 1461, *supra*, pp. 2–3, does not authorize the exclusion of nonmailable matter from the mails; (2) that, if it does authorize such exclusion, it is invalid under the First Amendment: (3) that the administrative hearing before the Post Office Department was unfair; and (4) that the publications involved were not obscene (J. A. 101–102). The court ruled that it would consider the issue of obscenity *de novo* (J. A. 105), and offered to receive testimony (J. A. 102). Counsel for petitioners offered the testimony of two witnesses—Dr. Albert Ellis, a psychologist, and Mr. Eugene Thye, an art historian. This testimony had not been offered before the Hearing Examiner but counsel for petitioner represented that it had been offered to the Solicitor (J. A. 109–110).*

*A motion for leave to submit evidence on community standards was filed with the Post Office Department on January 24, 1955, one week after the hearing before the examiner, and four

It developed that neither of these witnesses was present in the courtroom prepared to testify. The court reiterated its willingness to hear the testimony of witnesses touching the obscenity of the particular photographs before it (J. A. 111). Counsel for petitioners then made an offer of proof *as if* the witnesses were present and prepared to testify, by summarizing the testimony they would give. This summary indicated that the witnesses, if present, would give their opinions as to American attitudes toward nudism in American life and art (J. A. 112–115). The court ruled that the issue before it was obscenity, not the propriety of nudism, and that the summarized testimony was not relevant to the obscenity or non-obscenity of the pictures in the particular magazines before it (J. A. 115–116).

The District Court held that the action of the Post Office Department in excluding the two publications from the mails was authorized by 18 U. S. C. 1461; that the statute as so construed was not unconstitutional; that the Post Office Department's finding that the two numbers were obscene was supported by substantial evidence; and that, as independently determined by the court, the two magazines were in fact obscene (J. A. 117–135). This ruling was embodied in formal findings and conclusions (J. A. 135–139), and the amended complaint was dismissed (J. A. 139).

6. *Proceedings in the Court of Appeals.*—Petitioners appealed to the Court of Appeals for the District

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days after his initial decision and recommendations. Neither the motion nor the brief in support of it referred to the witnesses which petitioners proffered in the District Court (J. A. 57–59).

of Columbia Circuit (J. A. 140). A division of that court, in an opinion by Washington, C. J., reversed the judgment of the District Court on the ground that the order of the Post Office Department was "invalid" (Pet. App. 62–68). The opinion held that improper standards had been applied in making the determination of obscenity; and, further, that 18 U. S. C. 1461 "contains no language which can be construed to permit the Department to refuse to transport and deliver newspapers and magazines pending final decision on its part as to whether their content is acceptable to it" (Pet. App. 67). Judge Danaher dissented from both grounds (Pet. App. 68–72).

The Government then moved for, and was granted, a rehearing by the court sitting *en banc* (J. A. 167; Pet. App. 44). Reargument was heard by eight judges on September 25, 1956,[5] but because of the pendency in this Court of several important cases bearing on the issues raised by the appeal,[6] the Court of Appeals postponed decision until October 3, 1957 (Pet. App. 44). The court *en banc* took a position contrary to the earlier determination by the three-judge division, and affirmed the judgment of the District Court. The judgment of the court was announced by Circuit Judge Danaher in an opinion joined by Prettyman, Wilbur K. Miller and Bastian, C. JJ. Circuit Judge Fahy concurred separately.

[5] Circuit Judge Burger was Assistant Attorney General in charge of the Civil Division of the Department of Justice at the time the suit was filed, and so took no part in the consideration or hearing of the case (Pet. App. 41).

[6] *Roth* v. *United States*, 354 U. S. 476; *Alberts* v. *California*, 354 U. S. 476; *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436.

Circuit Judge Washington, joined by Chief Judge Edgerton and Circuit Judge Bazelon, dissented.

ARGUMENT

In the questions they specify for review (Pet 2–3), petitioners do not raise any issue under the First Amendment, nor are they in a position to claim that Amendment's protection for obscene matter contained in the two issues of their magazines here involved. *Roth* v. *United States*, 354 U. S. 476; *Kingsley Books, Inc.*, v. *Brown*, 354 U. S. 436.[1] They limit their request for review to the questions whether 18 U. S. C. 1461 permits the Postmaster General to exclude nonmailable obscenity from the mails; whether the administrative decision and the decision of the reviewing courts were in accord with the standards for determining obscenity set forth in *Roth* v. *United States, supra;* and whether their hearing before the Post Office Department granted them due process of law.

These questions do not merit review here, upon this particular record. First, the statute and its predecessors have, for more than 80 years, been uniformly construed by the courts, Congress, and the Post Office Department to permit administrative exclusion of obscenity from the mails; this necessarily

[1] Although petitioners attacked the Postmaster General's order and regulation under the First and Fifth Amendments (J. A. 37), their amended complaint did not challenge the constitutionality of 18 U. S. C. 1461 (J. A. 21–38). Accordingly, the constitutionality of the statute is not open to attack by them here. It should be noted that, had petitioners challenged the constitutionality of the statute in the District Court, a problem as to convening a three-judge court would have arisen. See 28 U. S. C. 2282.

includes power to delay dispatch of suspect matter for a brief period until a determination of mailability can be made. Second, the principles underlying this Court's decision in *Roth* were clearly and correctly applied by the Post Office Department and the reviewing tribunals. Finally, there is no occasion to hear petitioners' procedural complaints since this record shows that they were prepared to offer no testimony or other evidence relevant to the obscenity of the specific materials before the Post Office Department.

I.

1. (*a*). Congress has specifically empowered the Postmaster General to withhold matter he finds to be obscene from admittance to the mails. The statute provides in plain terms that "[e]very obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character * * * [*i*]*s declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.*" 18 U. S. C. 1461 (emphasis added). This is an express direction which cannot be ignored; obscene matter is not to be carried through the mails.

Comparable declarations of nonmailability, and the accompanying prohibition against conveyance in the mails and delivery by post offices and carriers, appear as part of a regular pattern for excluding from the mails matter which Congress has also made it a crime to mail. Explosives, poisons, disease germs, and intoxicating liquors are nonmailable (18 U. S. C.

1716); so are writings advocating treason, insurrection, or forcible resistance to the law (18 U. S. C. 1717); writings inciting to arson, murder, or assassination (18 U. S. C. 1461); concealable firearms (18 U. S. C. 1715); foreign divorce information (18 U. S. C. 1714); and contraceptive and abortive materials or information concerning their use (18 U. S. C. 1461). It cannot be argued that the unequivocal declaration of the nonmailability of such things as explosives nevertheless permits them to be circulated in the mails until a criminal conviction has been obtained, and there is no reason for construing the nonmailability provision differently for obscenity than for the other matters declared to be nonmailable. "The scope of the Postmaster General's alleged authority is confessedly the same whether the reason for the nonmailable quality of the matter inserted in a newspaper is that it violates the Espionage Act, or the copyright laws, or that it is part of a scheme to defraud, or concerns lotteries, or is indecent, or is in any other respect matter which Congress has declared shall not be admitted to the mails." (Brandeis, J., dissenting in *Milwaukee Publising Co.* v. *Burleson*, 255 U. S. 407, 418.) If matter is nonmailable, then, it must be excluded from the mails under the terms of the congressional command; if there is doubt as to its mailability, it may be withheld from dispatch until a decision on mailability is had, with due regard for both the mandate of Congress and the procedural rights of the sender.

(*b*). The legislative history supports and reinforces the view that it was the intent of Congress that the

Postmaster General should exclude nonmailable obscenity from the mails. The first statutory prohibition against admission of obscenity to the mails was Section 16 of the Act of March 3, 1865, 13 Stat. 507:

> SEC. 16. * * * *no obscene book, pamphlet, picture, print, or other publication of a vulgar and indecent character, shall be admitted into the mails of the United States;* any person or persons who shall deposit or cause to be deposited, in any post-office or branch post-office of the United States, for mailing or for delivery, an obscene book, pamphlet, picture, print, or other publication, knowing the same to be of a vulgar and indecent character, shall be deemed guilty of a misdemeanor * * * [emphasis added].

Since the criminal offense was defined completely in the clause beginning "any person * * *," the italicized language would have been superfluous if only a criminal statute were intended.

Moreover, the debates in the Senate show that in fact Congress designed the first clause to confer power on the Postmaster General to exclude obscenity from the mail. As reported in the Senate, the bill included the language quoted above and an additional clause, following the clause denying admission of obscenity to the mails, which provided "but all such obscene publications deposited in or received at any post office, or discovered in the mails, shall be seized and destroyed, or otherwise disposed of, as the Postmaster General shall direct" (Cong. Globe, 38th Cong., 2d Sess., 661). Senator Reverdy Johnson of Maryland feared that the bill as reported would lead to the mailing of obscene matter in sealed envelopes,

and that "the postmaster, whenever he suspects that the envelope contains anything which is obnoxious to objection [sic], will break the seal." He therefore moved to strike all the language of the bill except that defining the criminal offense. In response to this motion, Senator John Sherman of Ohio argued that "the legislative prohibition against carrying such matter *when it is known to the postmasters should be left.* Probably the second clause allowing him to open mail matter should be struck out * * *" (emphasis added). Senator Johnson thereupon modified his amendment to conform with Senator Sherman's suggestion, so that the bill as finally enacted permitted postmasters to refuse obscene matter admittance to the mails. (*Id.*)

In 1873, the duty thus imposed on postmasters not to admit obscene matter to the mails was supplemented by a statute making it a criminal offense for any Government employee knowingly to aid or abet the sending or receiving of obscene matter. Act of March 3, 1873, 17 Stat. 599, R. S. 1785, repealed in 35 Stat. 1153 (1909). Three years later, Congress revised the formula of the 1865 Act from a mandate that obscenity "shall [not] be admitted to the mails" to: "Every obscene, lewd, or lascivious book, pamphlet, picture * * * [etc.] are hereby declared to be non-mailable matter, and shall not be conveyed in the mails, nor delivered from any post-office nor by any letter-carrier." Act of July 12, 1876, 19 Stat. 90. This has remained the basic command of the statute down to the present day.

The statutory prohibition against conveyance of obscenity through the mails was again strengthened

in 1879 so that nonmailable matter could be stopped even if it reached the office of delivery. Act of March 3, 1879, 20 Stat. 360. This statute, dealing in part with fourth class matter, today reads (39 U. S. C. 243):

> * * * All matter declared nonmailable by Section 334 of Title 18 [now 18 U. S. C. 1461], which shall reach the office of delivery shall be held by the postmaster at the said office subject to the order of the Postmaster General.

Thus, between 1865 and 1880, Congress developed a comprehensive statutory scheme for the exclusion from the mails of obscene matter whenever it was discovered by the Post Office Department.

(*c*). The Post Office Department has implemented this mandate of Congress by an administrative practice which has been in force for more than 80 years. The earliest postal regulations placed the burden of excluding obscenity and other nonmailable matter upon the local postmaster. See, *e. g.*, Postal Laws and Regulations, 1873 ed., Reg. Section 88[8]; Postal Laws and Regulations, 1887 ed., Section 527[9]; Postal Laws

[8] Section 88. "All books, pamphlets, circulars, prints, &c., of an obscene, vulgar, or indecent character; * * * must be withdrawn from the mails by postmasters at either the office of mailing or the office of delivery."

[9] Section 527. "Postmasters are required to exclude from the mails all unmailable matter; but they are specially warned that they have no right to detain first class matter upon the mere suspicion that it contains anything forbidden to be sent in the mails.

"When matter manifestly obscene, or circulars concerning lotteries, are deposited for mailing, the postmaster should withdraw them, and send them with a full statement of the facts within his knowledge to the dead letter office."

and Regulations, 1893 ed., Section 335"; 1 Ops. Asst. Atty. Gen. for the Post Office Dept. 41 (1873); 4 Ops. Asst. Atty. Gen. for the Post Office Dept. 389, 391 (1907). In 1902, however, postmasters were instructed not to give opinions on the mailability of obscene matter, but to refer such questions to the First Assistant Postmaster General for instructions. Postal Laws and Regulations, 1902 ed., Section 497. Postmasters continued to be responsible in the first instance for excluding obscenity offered for dispatch. Postal Laws and Regulations, 1902 ed., Section 573.

The principles governing the administrative practice, and the historical distinction between the administrative and criminal sanctions established by Congress, were summarized in an opinion issued by the legal advisor of the Post Office Department in 1908 (4 Ops. Asst. Atty. Gen. for Post Office Dept. 741, 742):

> By the terms of [R. S.] 3893, however, it rests with the Post-Office Department to determine whether in a given case the matter offered for transmission is mailable or the contrary. If unmailable, it must be withheld from transmission; and it is evidently not contemplated by the statute that such action shall be postponed until the question whether or not the matter is legally transmissible shall be passed upon by the courts. The action taken by the Post-Office Department in refusing to transmit matter which it holds to be unmailable under the statute is entirely separate and apart from

[10] Section 335. "Postmasters are responsible for admission of improper matter, and will exercise great care to exclude whatever is manifestly unmailable."

> any criminal proceedings which may be instituted against the person depositing such matter in the mails. * * *

This interpretation has been consistently followed by the Post Office Department under the various amendments and revisions of the basic prohibition against conveyance of obscene matter in the mails.[11] That this administrative practice accords with the aim of Congress has been recognized in debate on the floor of the House, *e. g.*, 8 Cong. Rec. 697, in hearings before committees of Congress, *e. g.*, Hearings Before the Committee on Post Office and Civil Service, House of Representatives, 83rd Cong., 2d Sess., on H. R. 569, pp. 32–33, and in committee reports, *e. g.*, Sen. Rep. No. 747, 52nd Cong., 1st Sess.

The latter report reflects the care with which Congress has considered the matter. It concerns a bill (S. 2834, 52nd Cong.) which would have given the Postmaster General the power to declare nonmailable future issues of publications which regularly contain obscenity. The Senate Post Office and Post Roads Committee reported the bill unfavorably, noting that then-existing law, from which the present 18 U. S. C. 1461 is derived, already permitted the Postmaster

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[11] The 1865 statute, 13 Stat. 504, 507, was reincorporated into Section 148 of the revised postal laws of 1872. 17 Stat. 302. In 1873, Section 148 was amended, 17 Stat. 599, and the same year was incorporated into Title XLVI (The Postal Service) of the Revised Statutes, as Section 3893. R. S. 3893 was amended in 1876, 19 Stat. 90, and again in 1888, 25 Stat. 187. In 1909, it became Section 211 of the revised criminal code, 35 Stat. 1129, 1138. It was reenacted as Section 1461 of the criminal code in 1948, 62 Stat. 768, and amended again in 1955, 69 Stat. 183.

General to exclude obscene matter from the mails. The committee had reservations about the desirability of permitting the Postmaster General to exercise such power, but it noted (Sen. Rep. No. 747, 52nd Cong., 1st Sess., p. 3):

> * * * whatever may be the doubt as to the propriety, to say nothing as to the constitutionality, of clothing the Postmaster-General with this sole power, Congress has already done it in existing legislation in reference to all obscene, lewd, and lascivious books, pamphlets, pictures, papers, letters, writings, prints, or other publications of an indecent character. * * *

(*d*). The terms of the statute and its history, together with this long settled administrative practice and the aquiescence of Congress in that practice, make it undisputable that the Postmaster General has the statutory power to exclude obscene matter from the mails. See *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 296, 305. But there is also very substantial judicial precedent. In *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, this Court upheld the Postmaster General's decision to revoke the second class mailing privilege of a newspaper which he thought had violated the Espionage Act of 1917 by publishing nonmailable propaganda. In so ruling, the Court noted that the Postmaster General could have excluded the paper entirely, as nonmailable matter. 255 U. S. 407, 416. Mr. Justice Brandeis, while dissenting from the decision, also recognized this general practice (255 U. S. 407, 421):

> As a matter of administration the Postmaster General, through his subordinates, rejects mat-

ter offered for mailing, or removes matter already in the mail, which in his judgment is unmailable. The existence in the Postmaster General of the power to do this cannot be doubted. The only question which can arise is whether in the individual case the power has been illegally exercised." * * *

2. This duty imposed by 18 U. S. C. 1461 upon the Postmaster General to exclude obscene matter from the mails is not an abstract exhortation. It is a declaration of postal policy firmly coupled with a command that affirmative action be taken to bar obscenity from the mails. Cf. 5 U. S. C. 369. The Postmaster General, through his subordinates, must decide in any given case whether material subject to postal inspection is within any class of matter declared by Congress to be nonmailable. And the obligation to make such a decision necessarily includes authority to withhold doubtful matter from dispatch for a reasonable time until a decision can be rendered as to its mailability.[13] Obscenity is not different in

[12] See also, *e. g.*, *Roth* v. *Goldman*, 172 F. 2d 788 (C. A. 2), certiorari denied, 337 U. S. 938 (obscenity); *Gitlow* v. *Kiely*, 44 F. 2d 227 (S. D. N. Y.), affirmed, 49 F. 2d 1077 (C. A. 2) (inciting to revolution); *Burleson* v. *United States ex rel. Working Man's Co-op. Publishing Ass'n.*, 274 Fed. 749 (C. A. D. C.) (inciting to revolution); *Masses Publishing Co.* v. *Patten*, 246 Fed. 24 (C. A. 2) (violation of Espionage Act); *Anderson* v. *Patten*, 247 Fed. 382 (S. D. N. Y.) (obscenity). Cf. *One, Inc.* v. *Olesen*, 241 F. 2d 772 (C. A. 9), now pending on petition for certiorari, No. 290, this Term.

[13] There is no basis for any suggestion that undue delay can be attributed to the Post Office Department in this case. The total proceeding, from notice to final decision, took little more than three weeks, with part of that period accounted for by an extention granted at the request of counsel for petitioners. See

this respect from any other form of nonmailable matter. The dissenting judges below ignored this fact. They would construe the statute as if nonmailable matter were entitled to instantaneous dispatch, even though this would result in complete frustration of the policy laid down by Congress. Their views were apparently founded upon the erroneous belief that Congress had not authorized administrative exclusion of obscenity and other nonmailable matters.[14] But, as the majority correctly recognized and as we have shown, Congress has given the Postmaster General the necessary powers to implement its command, including power to permit a brief delay in dispatch while a determination of mailability is made.

We do not contend that such a decision would be valid if it was unreasonably delayed or if it was finally made without having given the sender the same opportunity for a hearing which petitioner has had. Cf. *Walker* v. *Popenoe,* 149 F. 2d 511 (C. A. D. C.). (The Post Office Department has recently adopted regulations to assure expeditious decision in "nonmailable" proceedings, 22 F. R. 8999.) But we submit that

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pp. 5–11, *supra.* It is unlikely that any administrative hearing of this or any other type could be noticed, heard, and decided in a shorter time than elapsed here.

[14] The minority below also relied upon the concurring opinion in *Walker* v. *Popenoe,* 149 F. 2d 511 (C. A. D. C.). In that case, unlike this one, the Postmaster General, without any notice or hearing, barred an educational pamphlet called "Preparing for Marriage" from the mails. The Court of Appeals held that the pamphlet was not obscene and, as an alternative ground, that failure to accord any hearing was a denial of due process. The question of whether a brief delay in dispatching the pamphlet prior to a fair hearing would have satisfied due process was not before the court.

18 U. S. C. 1461 cannot be construed without reference to the practicalities of postal administration which were considered by Congress when it conferred power to exclude nonmailable materials. See pp. 17–19, *supra*. To deny the Post Office Department the power to withhold doubtful matter from the mail until a decision on mailability had been rendered would render the nonmailability portion of the statute unenforceable. The barn could never be locked until after the horses were gone. Familiar principles of statutory construction forbid such an emasculation of a part of the statute which Congress deliberately inserted and has ever since maintained and strengthened. See, *e. g.*, *United States* v. *Menasche*, 348 U. S. 528, 539.

3. Petitioners contend that serious questions under the First Amendment will arise unless this statute is construed so as to render it ineffective. Their petition, however, does not raise these questions, and in any case, even in construing a statute narrowly to avoid constitutional doubts, the courts "must also avoid a construction that would seriously impair the effectiveness of the Act in coping with the problem it was designed to alleviate". *United States* v. *Harriss*, 347 U. S. 612, 623. Also, we doubt that any serious First Amendment issue can arise out of Congress' clear direction that the Postmaster General should exclude obscene matter from the mail, so long as that mandate is fairly and expeditiously followed. Obscenity is not protected by the Constitution in state criminal proceedings (*Alberts* v. *California*, 354 U. S. 476), federal prosecutions for de-

positing it in the mails (*Roth* v. *United States*, 354 U. S. 476), or in state civil injunction proceedings to restrain its sale. *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436. It should not be treated differently in federal administrative proceedings subject to review on the record in the federal courts. Certainly, one who distributes obscenity through the mail has no greater rights under the First Amendment than one who uses the mails to conduct a fraudulent enterprise. *Donaldson* v. *Read Magazine*, 333 U. S. 178; *Public Clearing House* v. *Coyne*, 194 U. S. 497.

The mode of procedure used to determine what is and what is not obscene does not affect substantive rights under the First Amendment so long as it accords traditional standards of fairness. There is no constitutional requirement that the factual issue of obscenity be resolved by a jury. *Kingsley Books, Inc.* v. *Brown*, *supra*. And this Court has declined to rule that the First Amendment may have a different significance where obscenity is distributed through the federal mails than where it is distributed on a local basis. *Roth* v. *United States*, *supra*. Thus, the administrative power involved here, restricted as it is to particular items which may still be distributed outside the mails, does not raise any First Amendment issue requiring the excessively limited and belated interpretation of 18 U. S. C. 1461 which petitioners ask this Court now to consider.

Nor need there be any fear that the Post Office Department will be able to set itself up as a national cultural arbiter. Within the narrow scope of its authority to exclude obscenity from the mails, it is

obliged to apply contemporary community standards. On occasion, as with all human institutions, it may err in its application of this standard. If it does err, the courts stand ready to correct it. See, *e. g., Walker v. Popenoe,* 149 F. 2d 511 (C. A. D. C.). The familiar process of administrative decision and judicial review will piece out and reflect the obscenity standards of the community, which is, in the last analysis, the only cultural arbiter governing petitioners' publications and similar material.

II

The standard of obscenity applied by the Post Office Department and the courts below accorded with the criterion reiterated by this Court in *Roth* v. *United States,* 354 U. S. 476, and there is no need for this Court to review the concurrent findings made below with respect to the particular magazines here involved.

1. Little purpose would be served by re-analyzing the Hearing Examiner's opinion (see *supra,* pp. 8–10). He reviewed the pictures contained in petitioners' magazines in a manner entirely consistent with the reasoning in *Roth.* In fact, petitioners do not complain of the test invoked. Instead, they insist that it was incorrectly applied to their publications because the magazines were not considered as a whole. But the controlling fact is that the items found to be obscene were pictures. Many of these are unretouched photographs which plainly display, sometimes in offensive postures, male and female sexual organs. These pictures, in and of themselves, constitute independent obscene items. The text of

petitioners' magazines advocating nudism is innocuous, but, as the Hearing Examiner pointed out (*supra*, p. 10), the Post Office Department is not concerned with petitioners' advocacy of nudism. As the law requires, it is concerned only with whether petitioners are using the mails to distribute obscenity.

Photographs of the naked human body, particularly photographs displaying certain portions of the anatomy, have a psychosexual force of their own, quite apart from any accompanying textual material. Occasionally, an innocent picture may be given an obscene connotation by the accompanying words. But it is unlikely that an obscene picture of the naked body will be purified by its caption. In the statute in force at the time of the administrative decision, Congress specified "pictures" as a specific category of obscene item to be barred from the mails.[18] The fact that petitioners choose to accompany obscene pictures with innocuous textual matter does not make such pictures mailable.

2. Some of the pictures were described by the District Court as "vile," "filthy" and "grotesque." Petitioners complain that these were not correct synonyms for the *Roth* standard (Pet. 31). But the *Roth* criterion is a concise expression of a living concept of law, not a formulary, and the substance of that principle was carefully applied by the District Court. Terms such as "vile" and "filthy" appear in

[18] The substitution in 1955 of general terms for the specifically enumerated items in 18 U. S. C. 1461 (69 Stat. 183) did not affect the substantive prohibition against mailing obscene pictures. See Sen. Rep. No. 113, 84th Cong., 1st Sess.

the statute as it is presently worded, and are appropriate to describe those photographs in petitioners' magazines which appeal to a morbid or shameful interest in sex; in context, "grotesque" as used here conveys a similar meaning. In any event, the Court of Appeals considered the matter *de novo* and explicitly concluded that the illustrations in the magazines constitute " 'material which deals with sex in a manner appealing to the prurient interest,' and hence is obscene, as *Roth* tells us." (Pet. 49–50, 53).

3. Petitioners complain further that the Court of Appeals misapplied the *Roth* standard because it did not judge the illustrations in their magazines in the light of their own conduct and intent (Pet. 32). But this is not a criminal proceeding, in which *mens rea* is an element of liability. It is a civil administrative proceeding to determine whether the photographs in petitioners' magazines are mailable. Petitioners' intentions, however well-meaning, do not make their pictures mailable if the pictures' dominant theme—to the average person, applying contemporary community standards, when viewing the pictures as a whole—appeals to prurient interests. The subjective intentions of petitioners' sponsors no more permit them to distribute such pictures in the mails than their sincerity would permit them to advocate their views by parading down Pennsylvania Avenue in the nude. The pictures, no less than the parade, must be objectively judged by the community standard, and not by their own private opinions and views.

III

Petitioners complain that they were denied a fair hearing by the Post Office Department because it refused to consider the evidence they offered to establish contemporary community standards. But we believe that they have no standing to make such a complaint in this case. At the administrative hearing, the only evidence they offered was from the cold record of a hearing which occurred several years before in a proceeding involving numbers of "Sunshine and Health" containing different materials. The Hearing Examiner ruled that such evidence was not relevant to the issue before him. Petitioners offered no testimony whatever on community standards as they related to the matters in the February 1955 numbers of their magazines, and they admitted that they had no such testimony to offer. After the close of the hearing, they again moved to have the record of other proceedings considered, in an ambiguously worded motion which purportedly offered evidence of contemporary community standards (J. A. 57), *supra*, pp. 11–12, fn. 4. But this untimely motion contained no express description of any proffered evidence bearing on the two magazines then before the Post Office Department. Finally, when the question of obscenity was considered *de novo* in the District Court, petitioners made what proved to be a hypothetical offer of testimony bearing not on the two magazines but on the abstract question of nudism in American life and art.

On this record, there is no occasion for this Court to resolve what petitioners term a major due process

issue—whether expert evidence of contemporary community standards must be received by the trier-of-fact in an obscenity case. Such is the uncertainty of the social sciences in the measurement of community behavior (see Frank, J., concurring in *Roth* v. *Goldman*, 172 F. 2d 788, 795, (C. A. 2)), that it is at least doubtful that evidence of this type *must* be received as a matter of due process. The admissibility of such evidence is a question of policy about which there is wide dispute. See American Law Institute, Model Penal Code, Tentative Draft No. 6, comments on Sec. 207–10. The present record does not lay a proper foundation for consideration of the issue here since it discloses only ambiguous and hypothetical offers of evidence obviously infected by irrelevant materials.[16]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
SAMUEL D. SLADE,
HOWARD E. SHAPIRO,
Attorneys.

DECEMBER 1957.

[16] Petitioners include in their argument an exposition of the procedures which they think the Post Office Department would prefer. The Department's desire for fairness in mailability proceedings is reflected more accurately in the recently published regulations, 22 F. R. 8999, which embody the experience of petitioners' case, than in petitioners' speculations about the Post Office Department's preferences.

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